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THE INVESTIGATING POWER OF CONGRESS: ITS SCOPE AND LIMITATIONS

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The United States Supreme Court, in its most recent opinion dealing with the subject of the investigating power of Congress, said: "There is wide concern both in and out of Congress, over some aspects of the exercise of the Congressional power of investigation."[1] The statement was not an exaggerated one when made. If made today, it would be an understatement of considerable proportions.

Even the less perceptive observers of the American political scene must by now be aware that Congressional investigations are a subject about which almost everyone has an opinion. As is the case with other aspects of the political world, much of the opinion is based upon emotion and instinct rather than upon intellect. Laymen and lawyers alike praise, condone, and condemn committees, committee chairmen, committee procedures, etc., frequently without recourse to any of the available facts. In the recent Zwicker incident,[2] millions had opinions, yet probably not more than one in ten thousand read the transcript of the hearing and not one in a hundred thousand took the time to inform himself of the legal issues involved. It is therefore fitting and proper that, in the midst of the turbulence and turmoil of political strife, we pause to consider just what it is all about.

THE BACKGROUND

The subject of Congressional investigating power has been considered extensively in legal literature.[3] This is not the first time in our history that such investigations have been the subject of

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[1] U. S. v. Rumely, 345 U. S. 41 (1953).

[2] See Hearings before Senate Committee on Government Operations, Permanent Subcommittee on Investigations, 83d Congress, 2d Sess. (1954).

[3] Leading works include:

Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926).

Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. OF PA. L. REV. 691 (1926).

McGeary, *Development of Congressional Investigative Power*, (1940).

See also *Congressional Investigations: A Symposium*, 18 U. of Chi. L. Rev. 421-661 (1951).

For analyses and criticisms of the work of particular committees, see: *Constitutional Limitations on the Un-American Activities Committee*, 47 COLUMBIA L. REV. 416 (1947); *Investigating Powers of the House Un-American Activities Committee*, 33 CORNELL L.Q. 565 (1948); *The Un-American Activities Committee*, 18 U. OF CHI. L. REV. 598 (1951); *Senate Preparedness Subcommittee*, 18 U. OF CHI. L. REV. 634 (1951); *House Select Committee on Lobbying Activities*, 18 U. OF CHI. L. REV. 647 (1951); and *Subcommittee on Monopoly Power of the House Judiciary Committee*, 18 U. OF CHI. L. REV. 658 (1951).

widespread derogatory comment. Criticism has been sharp at times in the past,[4] but in general the legal writers have indicated a desire to have the scope and limitations of the power determined by principles of law rather than by a desire to clip the wings of some transient demagogue who happens to be flitting across the American political scene.

Congressional investigations have a long and tempestuous history in the United States.[5] One of the first recorded legislative investigations in the United States was that by the House of Representatives into General St. Clair's disaster in the Northwest Territory in 1792.[6]

The Constitution makes no provision for Congressional investigations. The English parliament and colonial legislatures, however, exercised investigatory powers before the adoption of our own Constitution;[7] and the Congress possesses an inherent power to investigate to aid in the discharge of its legislative function under a tri-partite system of government. The U. S. Constitution gives Congress the power to legislate.[8] The U. S. Code contains several sections which are based on an assumed inherent legislative power to investigate. Provision is made for administration of oaths to witnesses [9], and for refusal of witnesses to testify.[10]

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[4] See Wigmore, *Legislative Power to Compel Testimonial Disclosure*, 19 ILL. L. REV. 452 (1925), where the Teapot Dome investigation is described thus:

> The Senatorial debauch of investigations . . . poking into political garbage cans and dragging the sewers of political intrigue . . . filled the winter . . . with a stench which has not yet passed away . . . the Senate . . . fell . . . in popular estimate to the level of professional searchers of the municipal dunghills . . .

[5] For an excellent thorough historical summary, see Landis, *op cit.* supra note 3. See also *Congressional Investigations*, 41 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 618 (1951); and Galloway, *The Investigative Function of Congress*, 21AM. POL. SCI. REV. 47 (1927).

[6] Annals of Cong. 490 (1792).

[7] Landis, *op cit.* supra note 3 at 159; Fields v. U. S. (App. D. C. 1947) 164 F2d 97, 99, cert. den., 332 U. S. 851 (1948).

[8] U. S. CONST. Art. I § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

[9] § *191 Oaths to witnesses*

> The President of the Senate, the Speaker of the House of Representatives, or a chairman of any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or of a committee of the whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination.
>
> Any member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a Member, or any committee thereof. Stat. 942, 2 U.S.C. §191.

[10] §*192 Refusal of witness to testify*

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress,

Congressional investigations first began to capture the public's imagination in the period following the Civil War, and the increased power and influence of the press was a not insignificant factor in the change. The controversial, front-page investigation which arouses public indignation—sometimes against the investigators, sometimes against the investigated—has been said to have been "created by the press—the press has been its power and its undoing."[11]

From time to time Congress passes statutes which require disclosure of facts it deems necessary to assist it in legislating, like the Federal Corrupt Practices Act and the Federal Lobbying Act.[12] The right of Congress to do so has been upheld by the Courts.[13] But these statutes are only a small part of the investigative function of the Congress. By far the biggest proportion of the power is manifested by inquiries conducted by the Houses of Congress themselves, or by Committees thereof.

The legislative inquiry has been described as "the logical concomitant and indispensable subsidiary of the legislative powers [whose place] has never been seriously challenged and the Supreme Court, with one notable exception, has shown a wise and understandable reluctance to interfere with or impose significant limitations upon the Congress in the use of this legislative tool."[14]

Congressional investigations may be carried out by permanent ("standing") committees or by temporary ("select") committees. In the former case, the chairman is invariably picked on the basis of seniority in the majority party and tenure on the Committee. In the latter case, custom dictates that the member who introduced the resolution creating the committee shall be its chairman. In general, controversy has centered more on the activities of select committees. This may well be because select committees "enable young and energetic members to sidestep the seniority custom, to employ expert and zealous personnel, and to conduct vigorous and searching investigations into vital public questions."[15]

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willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. 52 Stat. 942. *2 U.S.C.* §192.

[11] *Congressional Investigations*, 38 GEO. L. J. 343 (1950).

[12] The Federal Corrupt Practices Act, 43 Stat. 1070, 2 U.S.C. §§241-256; The Federal Lobbying Act, 60 Stat. 842, 2 U.S.C. §§261-270.

[13] Burroughs v. U. S., 290 U. S. 534 (1934), sustaining the Corrupt Practices Act; U. S. v. Harriss, — U. S., — (1954), 98 L. Ed. 661, June 21, 1954, sustaining the Federal Lobbying Act.

[14] Keele, *Note on Congressional Investigations*, 40 A.B.A.J. 154 (1954). The exception is stated to be Kilbourn v. Thompson, 103 U.S. 168 (1880).

[15] Galloway, *Congress in Action*, 28 NEB. L. REV. 493 (1949). The seniority custom usually requires many years of legislative service before a member becomes a Chairman. The Junior Senator from Wisconsin was able to become Chairman of a standing Committee after only five years of service principally

Two of the present members of the United States Supreme Court are on record for strong Congressional investigating power. Justice Black has stated: "There is no power on earth that can tear away the veil behind which operate powerful and audacious and unscrupulous groups save the sovereign legislative power armed with the right of subpoena and search."[16] Back in another period of criticism of Congressional investigations, Mr. Justice Frankfurter said: ". . . the procedure of Congressional investigation should remain as it is. No limitation should be imposed by Congressional legislation or standing rules. The power of investigation should be left untrammelled, and the methods and form of each investigation should be left for determination of Congress and its Committees, as each situation arises."[17]

The problem is not exclusively an American one. Legislative power of inquiry exists to varying degrees in other nations of the world, but only in France has it achieved the controversial status before the public that it has in America.[18]

The number of Congressional inquiries here in America has increased in recent years,[19] as has the amount of public interest in them. The advent of television, more than any other single factor, has brought the entire legislative process closer to all of the people; and it is likely that public interest will continue to wax strong.

THE SCOPE OF THE INVESTIGATING POWER

The Congressional power of investigation is limited to matters reasonably pertinent to an inquiry which bears a reasonable relationship to a subject as to which Congress may validly legislate.[20] Investigations must be in aid of a legislative purpose. However, a *bona fide* legislative purpose will be presumed.[21] The presumption is probably conclusive.[22]

Congress may investigate to determine qualifications of its members, or circumstances surrounding their elections, both general and primary.[23] The inquiry may be directed toward establish-

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because the Committee in question was created, just prior to his election, by the Legislative Reorganization Act of 1946. Members of the Senate with greater seniority chose Committee assignments then considered to be of greater importance.

[16] *Inside a Senate Investigation*, 172 HARPERS 275, 276 (1936).

[17] *Hands Off the Investigations*, 38 NEW REPUBLIC 329, 331 (1924).

[18] For an interesting commentary on the practical effects of lack of strong investigative powers in foreign legislatures, see Ehrmann, *The Duty of Disclosure in Parliamentary Investigation: A Comparative Study*, 11 U. OF CHI. L. REV. 1 (1943) and 117 (1944).

[19] It has been estimated that the 82d Congress alone appropriated $5,700,000 for 236 *special* investigations. 10 Congressional Quarterly 941 (1953).

[20] McGrain v. Daugherty, 273 U. S. 135 (1927).

[21] *In re* Chapman, 166 U. S. 661 (1897); McGrain v. Daugherty, 273 U. S. 135 (1927).

[22] See U.S. v. Johnson, 319 U.S. 503 (1943).

[23] Reed v. County Commissioners, 277 U. S. 376 (1928); U. S. v. Norris, 300 U. S. 564 (1937).

ment of facts on which to base an impeachment proceeding,[24] or expulsion or censure of a member.[25] The investigation may concern itself with the administration of a portion of the executive branch of the Government,[26] and use or misuse of appropriated funds.[27]

Although much has been written and said about the "informing function of Congress,"[28] there has not been any judicial ruling upholding an investigation solely on that basis.[29] As long as the presently recognized broad scope of legislative purpose remains, the question will almost certainly continue to be an academic one.[30]

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[24] Kilbourn v. Thompson, 103 U. S. 168 at 190 (1880).

[25] *In re* Chapman, 166 U. S. 661 (1897).

[26] McGrain v. Daugherty, 273 U. S. 135 (1927). This power is accepted by all writers on the subject.

[27] Innumerable investigations of the executive branch have been conducted on this basis. *Query*, would a similar investigation of the judicial branch be valid?

[28] See WILSON, CONGRESSIONAL GOVERNMENT, 303 (15th Ed., 1913) where it is stated that this function is more important than the legislative function. While the latter could exist without the former, it is difficult to see how the former could exist without the latter. In the recent case of U. S. v. Rumely, 345 U. S. 41 (1953), noted elsewhere herein, the court, per Mr. Justice Frankfurter, quoted the following excerpt from "Congressional Government" as an example of the "reach that may be claimed" for the investigative power of Congress:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. *The informing function of Congress should be preferred even to its legislative function.* (Emphasis added).

The same quotation has more recently been set forth in the annual report of the Senate Committee on Government Operations, made by its Permanent Subcommittee on Investigations. The Subcommittee, chairmaned by Senator Joseph R. McCarthy and guided by Chief Counsel Roy M. Cohn, states that the Wilson quote was "cited by the Supreme Court in U. S. v. Rumeley (sic)."

[29] See dictum in Electric Bond and Share Co. v. S.E.C., 303 U. S. 419, at 437 (1938). In *McGrain v. Daugherty* the court said that "the only legitimate object the Senate could have in ordering the investigation was to aid it in legislating." 273 U. S. 135, 177 (1927).

[30] The question could conceivably arise out of a practice of some contemporary investigating committees. A witness is called before the committee in executive session, away from the prying of the press and the public. The witness answers some questions of Committee Counsel, refuses to answer others. Some of the questioning is adjudged by the Committee Chairman to be valuable in furthering his personal ambitions, and some testimony does not meet that test. The witness is then called before a public session, same Committee, same Chairman, same Counsel. Only the questioning which is to the Chairman's self-presumed advantage is repeated. The witness refuses to answer and is cited for contempt. The questions were pertinent to a legislative purpose, and no constitutional question of privilege, freedom of speech, etc., was raised. May the witness be convicted of contempt based exclusively on the public refusal?

Some writers on the subject would apparently answer yes, as they have

Some legislative investigations are undoubtedly carried on for reasons of political aggrandizement, personal or party, but such a purpose provides no legal basis for an investigation.

The development and effective use of the Congressional investigation has been acclaimed as the best method of restoring the balance of separate government powers.[31] Legislative investigations provide the best method by which the Congress can learn the facts necessary to an intelligent determination of what legislation is needed and what legislation is not needed. A former President of the United States has declared:

> . . . the power of investigation is one of the most important powers of the Congress. The manner in which that power is exercised will largely determine the position and prestige of the Congress in the future. An informed Congress is a wise Congress; an uninformed Congress surely will forfeit a large portion of the respect and confidence of the people.[32]

Congress may investigate over a wide range of subject matters in furtherance of a legislative purpose. It appears that Congress may validly investigate in areas where its power to legislate is limited.[33] But see the concurring opinion of Mr. Justice Douglas (in which Justice Black concurred) in *U. S. v. Rumely* where it is stated that inquiry is precluded into "any matter in respect to which no valid legislation could be had."[34] Those who assert that

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asserted that investigating committees have free scope of inquiry merely to bring facts to the public attention. See *McGeary, op. cit.* supra notes 3 at 104; Herwitz and Mulligan, *The Legislative Investigating Committee*, 33 COL. L. REV. 4 at 6 (1933); Ehrmann, *op cit.* supra note 18. It is submitted that legislative purposes have been served by the executive session, and that a contempt citation based solely on the public testimony would not be valid.

[31] Meader, *Limitations on Congressional Investigation*, 47 MICH. L. REV. 775 (1949).

[32] Senator Harry S. Truman, 90 Cong. Rec. 6747 (Aug. 7, 1944).

[33] See *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946); Endicott Johnson Corp. v. Perkins, 317 U. S. 501 (1943); I.C.C. v. Goodrich Transit Co., 224 U. S. 194 (1912). In the *Oklahoma Press Publishing* case it was held that the First Amendment did not preclude a subpoena by an administrative official requiring a newspaper to disclose the interstate distribution of its paper, dissemination of its news, or the source of its advertising receipts. In the I.C.C. case it was stated that ". . . requiring . . . information concerning a business is not regulation of that business . . ." In the *Oklahoma Press Publishing* case the court brought under consideration the power of Congress itself to investigate, although the actions of an administrative agency were being questioned, stating:

> For to deny the validity of the orders would be in effect to deny not only Congress' power to enact the provisions sustaining them, but also its authority to delegate effective power to investigate violations of its own laws, if not perhaps also its own power to make such investigations.

[34] 345 U. S. 41 (1953), citing Kilbourn v. Thompson, 103 U. S. 168, 194, 195 (1880); and McGrain v. Daugherty 273 U. S. 135, 171 (1927).

Congress may inquire only in fields in which it may validly legislate overlook the fact that if this were the case, the existence or non-existence of the power to inquire could often be determined only by an inquiry itself.[34a]

If it is ever held that Congress may not investigate except in fields where it may validly legislate, it may become pertinent to ascertain whether the Congressional power to propose amendments[35] enlarges its power of investigation. To date, the matter has not been adjudicated. Law review writers frequently cite a British case on the subject,[36] which answered in the negative as to the Australian Constitution.

The investigating power of Congress may be likened to the broad powers of a Grand Jury, where successful challenges to power are few and far between.[37] It will thus be seen that the scope of the investigative power of Congress is broad indeed, and necessarily so. The legislative function encompasses decisions to enact laws, but it includes more. It also necessarily includes the power to decide what laws *not to enact*, and the gathering of information necessary to make such determinations. This is a broad assignment and requires broad powers for its proper discharge.

It is often asserted that Congress may not compel any testimony with respect to matters of opinion or belief, religious, political, economic, or otherwise.[38] It must be remembered, however, that questions may legitimately be asked relating to *acts* of an individual which may incidentally touch upon a person's beliefs.[39] When such beliefs also involve some other interest into which the Congress may legitimately inquire, the public purpose must and will override the private belief. Purely personal private affairs into which Congress may not pry[40] are no longer personal when they become pertinent to a Congressional inquiry.[41]

Congress need not specify what sort of legislation, if any, is expected to come from a committee in order to validate its in-

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[34a] See the hypothetical situation outlined in Morgan, *Congressional Investigations and Judicial Reviews: Kilbourn v. Thompson Revisited*, 37 CALIF. L. REV. 556 (1949).

[35] U. S. CONST., Art. V. "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . ."

[36] Attorney-General v. Colonial Sugar Refining Co. (1914) A.C. 233 (P.C. 1913).

[37] Some grand jury powers are described in *Blair v. U. S.*, 250 U. S. 273, 282 (1919), which, significantly, was cited with approval in the Oklahoma Press Publishing Co. case.

[38] See Boudin, *Congressional and Agency Investigations: Their Uses and Abuses*, 35 VA. L. REV. 143 (1949).

[39] "Are you now or have you ever been a member of the Communist Party?" The propriety of this question has been sustained by the courts. Barsky v. U. S., 167 F2d 241 (C.A.D.C., 1948); cert. den. 334 U. S. 843 (1948).

[40] Kilbourn v. Thompson, 103 U. S. 168 (1880).

[41] McGrain v. Daugherty, 273 U. S. 135 (1927); U. S. v. Barsky, 167 F2d 241 (C.A.D.C., 1948), cert. den. 334 U. S. 843 (1948).

quiries.[42] Nor is it of any significance that no legislation has resulted from the Committee's work.[43] It is enough that there is a mere possibility that some legislation will result, and it is immaterial that invalid as well as valid legislation may stem from the investigation.[44]

Those who would further restrict the investigating power of Congress invariably cite *Kilbourn v. Thompson*,[45] which has been described as the "low water mark of the Congressional power of investigation."[46] *Kilbourn v. Thompson* has been criticized by the United States Supreme Court for its "loose language," and note has been made of "the weighty criticism to which it has been subjected" and the "inroads that have been made upon it by later cases."[47]

Applicability of the Bill of Rights to Congressional Investigations

First Amendment

The First Amendment to the U. S. Constitution[48] has not been successfully asserted to date as a valid reason for refusing to answer questions or to produce papers for a Congressional investigation. Either of two of the provisions of the First Amendment might be cited as grounds for refusal:

(1) freedom of speech, or

(2) freedom of the press.

A recent attack on a prosecution for contempt of Congress alleged a violation of this Amendment and failed.[49]

At least one witness has been cited for contempt for refusing to answer questions of a Congressional committee solely on the grounds of protection allegedly afforded by the First Amendment.[50] The basis of such a refusal has been severely criticized as "a me-

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[42] McGrain v. Daugherty, 273 U. S. 135 (1927); *In re* Chapman, 166 U. S. 661 (1897).

[43] Townsend v. U. S., 95 F2d 352 (C.A.D.C., 1938); cert. den., 303 U. S. 664 (1948).

[44] Barsky v. U. S., 167 F2d 241 (C.A.D.C., 1948); cert. den., 334 U. S. 843 (1948).

[45] 103 U. S. 168 (1881).

[46] McGeary, *The Congressional Power of Investigation*, 28 Nebraska L. Rev. 516 (1949).

[47] U. S. v. Rumely, 345 U. S. 41 (1953); the criticism is stated to include Fairman, Mr. Justice Miller and the Supreme Court, 332-34, Landis, *op. cit.* supra note 3; the inroads are stated to have been made by McGrain v. Daugherty, 273 U. S. 135, 170, 171, (1927) and Sinclair v. U. S., 279 U. S. 263 (1929).

[48] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[49] U. S. v. Emspack, 95 F Supp. 1010 (D.C., D.C. 1951).

[50] Harvey O'Connor, cited by the U. S. Senate July 23, 1953 and indicted by federal grand jury October 16, 1953.

chanical interpretation of the First Amendment."[51] Another witness refused to answer because of the First Amendment and advice of Dr. Albert Einstein.[52]

The "clear and present danger" tests used to evaluate legislation under the First Amendment are patently inapplicable to Congressional investigations to determine whether allegedly subversive movements constitute a danger either to the security of the nation or to its very existence.

Fourth Amendment

The operation of a Congressional investigation is subject to the "unreasonable searches and seizures" provision of the Fourth Amendment to the U. S. Constitution.[53] Injunctions have been granted on the basis of this provision.[54] Subpoenas which are unreasonably broad and vague may violate this Amendment.[55] The validity of questions relating to stock transactions of a member of the Senate has been upheld.[56]

Fifth Amendment

A witness before a Congressional committee may refuse to answer questions on the grounds of the privilege against self-incrimination which is contained in the Fifth Amendment.[57] Immunity from prosecution based on the Fifth Amendment is granted only when the Constitutional privilege is asserted.[57a] Moreover, the immunity extends only to the specific testimony made, and not to evidence discovered as a result of the testimony. The testimony of a witness before a Congressional committee may be introduced in a contempt prosecution based on the testimony despite the fact that a literal reading of the statute might lead to the opposite conclusion.[58]

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[51] Nutting, *Freedom of Silence*, 47 MICH. L. REV. 181 (1948). Nutting contends that we should assume that "freedom of silence" is a liberty protected by the due process clause of the Fifth Amendment, which does not necessarily have the same content as the free speech portion of the First Amendment.

[52] Albert Shadowitz. See New York Times, Dec. 17, 1953, p. 1. The witness was cited for contempt August 16, 1954. 100 Congressional Record 13935 (Daily Edition).

[53] U. S. CONST., Amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[54] Strawn v. Western Union, Eq. 60 814-36, Sup. Ct., D.C., unreported (1936). The case is discussed further in note 78 below.

[55] Such a holding re administrative agencies will be found in *F.T.C. v. American Tobacco Co.*, 264 U. S. 298 (1924). See also Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 at 209 (1946).

[56] In re Chapman, 166 U. S. 661 (1897).

[57] U. S. CONST., Amend. V. ". . . nor shall any person be compelled in any criminal case to be a witness against himself . . ."

[57a] May v. U. S., 175 F2d 994 (C.A.D.C.), cert. den. 338 U. S. 830 (1949).

[58] U. S. v. Bryan, 339 U. S. 323 (1950); U. S. v. Fleischman, 339 U. S. 349 (1950); Barsky v. U. S., 167 F2d 241 (C.A.D.C.), cert. den. 334 U. S. 843 (1948).

Congress may meet refusals to testify by a grant of immunity to witnesses, who must then testify.[59] Congress has seen fit to enact a statute giving a degree of immunity to persons testifying before Congressional committees.[60] The statute extends its protection to witnesses whether or not they claim the Constitutional privilege against self-incrimination, and it applies in state courts as well as federal.[61] The present statute does not give witnesses complete immunity from prosecution, and thus is not broad enough for Congress to be able to compel witnesses to give self-incriminating testimony.[62]

The Supreme Court has held that witnesses before federal grand juries may refuse to answer questions dealing with Communist party activities on the grounds that the answers might tend to incriminate the witness.[63] The same privilege extends to testimony before Congressional committees.[64]

There has been no reported adjudication of the question of whether a Congressional investigating committee may deny the claim of privilege where the possibility of incrimination is without substance. In judicial proceedings, the court has the power to make such a determination.[65]

The resolution creating one committee has been upheld as against an attack that it violated the due process clause of the Fifth Amendment as setting up no recognizable standards for the scope of the committee or for its conduct.[66] The due process clause has produced much litigation concerning the validity of the end products of the legislative process, laws themselves. Strangely enough, it has not often been relied on as grounds for attack on the intermediate steps in the legislative process. If it were seized upon by the courts as a device to increase the scope of judicial review of the investigating power of Congress, the result might well be a considerable disturbance in the existing equilibrium among the branches of government.

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[59] Hale v. Henkel, 201 U. S. 43 (1906).

[60] 11 Stat. 156 (1857), as amended 12 Stat. 333 (1862), as codified, Rev. Stat. §859 (1875), as amended, 52 Stat. 943 (1938), as amended 62 Stat. 833, 18 U.S.C. §3486. The section reads as follows: *Testimony before Congress: Immunity.* "No testimony given by a witness before either House, or before any Committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceedings against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

[61] Adams v. Maryland, — U. S. —, 98 L. Ed. 360 (1954).

[62] Counselman v. Hitchcock, 142 U. S. 547 (1892).

[63] Blau v. U. S., 340 U. S. 159 (1950).

[64] U. S. v. Nelson (D.C., D.C.), 103 F. Supp. 215 (1952).

[65] Mason v. U. S., 244 U. S. 362 (1917).

[66] U. S. v. Dennis, 72 F. Supp. 417, (D.C., D.C. 1947), aff'd 171 F2d 986 (C.A.D.C. 1948), aff'd 339 U. S. 162 (1950), rehearing denied 339 U. S. 950 (1950).

Sixth Amendment

The provisions of the Sixth Amendment[67] have no direct application to Congressional investigations, since such proceedings are not criminal prosecutions. It has been asserted, however, that the Amendment applies to all cases where a person is "put on trial," whether the proceeding be strictly criminal or not, and that therefore "vagueness in a resolution authorizing an investigation is objectionable under the Sixth Amendment where an attempt is made to put one 'on trial' under it."[68] In the unlikely event of a judicial holding along these lines, a witness before a Congressional Committee would, under certain circumstances, be entitled to (1) be informed of the nature of the "accusation"; (2) be confronted with witnesses against him; (3) have compulsory process for obtaining witnesses in his favor; and (4) have the assistance of counsel.

OTHER CHALLENGES TO THE CONGRESSIONAL POWER OF INVESTIGATION

False Testimony

Perjury before a Congressional committee is a federal crime, a violation of the U. S. Code.[69] If the offense is committed within the District of Columbia, the prosecution may be brought under the District Code,[70] which provides a greater penalty that the U. S. Code.

Before a conviction for perjury for false testimony before a Congressional committee may be sustained, it must appear that a quorum was present when the offense was committed, for the perjury must be before a "competent tribunal."[71] What constitutes a "quorum" is a matter for the Congress itself to decide.[72] The fact that the false statements complained of were subsequently

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[67] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

[68] Boudin, *op cit.* supra note 38.

[69] 62 Stat. 773, 18 U.S.C. §1621.

[70] D. C. Code § 22-2501.

[71] *Christoffel v. U. S.*, 338 U. S. 84 (1949). This decision has been stated to open up "a veritable Pandora's box of new implications of vastly extended judicial supervision and control over every step of the legislative process" because the court "[held] that (1) the status of a standing committee of the House of Representatives as a 'competent tribunal' within the meaning of the District of Columbia perjury statute, and (2) the integrity of the committee's records as to the presence of a quorum, could be impeached by parol evidence . . ." Morgan, *op. cit.* supra note 34a.

The Christoffel case is discussed in a note *Absence of Committee Quorum as Defense to Perjury Charge*, 49 COL. L. REV. 1007 (1949).

[72] U. S. CONST., Art. I, §5, cl. 2. "Each House may determine the rules of its Proceedings."

retracted does not prevent prosecution for perjury.[72a] In a perjury prosecution, the question of materiality of testimony is for the court.[73]

The "competent tribunal" test goes to the question of Committee jurisdiction. On this subject, the current controversy between the Department of the Army and the chairman of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations presents a new problem. If perjury prosecutions are instituted, the question will arise as to whether the committee had the power to investigate the relationship between its staff and an executive department.[74] However, the Legislative Reference Service of the Library of Congress, which members of congress frequently consult for advice as to the status of the law, is of the opinion that it is very difficult "to attack successfully the jurisdiction of Congressional Committees."[75]

Suits for Injunctive Relief

The Congressional investigating power is sometimes challenged by civil suits for injunctions filed against the Committee chairman, members of the committee staff, or persons in possession of papers subpoenaed by a committee. Such attacks are, almost without exception, unsuccessful. The judicial branch of our government is reluctant to inject itself into the legislative process.

A recent effort to enjoin a committee chairman, Senator Joseph R. McCarthy, from forcing persons to produce documents in

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[72a] U. S. v. Norris, 300 U. S. 564 (1937).

[73] U. S. v. Weber, 197 F2d 237 (C. A. 2d, 1952); cert. den. 344 U. S. 834 (1952).

[74] See debate in the U. S. Senate between Senators Ellender and McCarthy, February 2, 1954, and memo of the Library of Congress there set forth, 100 Congressional Record 1048 (Daily Edition). The jurisdiction of the Committee is fixed by statute as follows:

(g) (1) Committee on Expenditures in the Executive Department, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

(A) Budget and accounting measures, other than appropriations.

(B) Reorganizations to the executive branch of the Government.

(2) Such committee shall have the duty of—

(A) Receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations to the Senate as it deems necessary or desirable in connection with the subject matter of such reports;

(B) studying the operation of Government activities at all levels with a view to determining its economy and efficiency;

(C) evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government;

(D) studying the intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member. (Committee name changed by S. Res. 280, 82d Cong.)

[75] Extension of Remarks of Hon. John W. McCormack, D., Mass., January 20, 1954, 100 Congressional Record A412 (Daily Edition), setting forth the text of a memorandum prepared by the Service.

their possession relating to loyalty board proceedings failed in the federal courts.[76] Similarly, a suit for an injunction filed against employees of the House Select Committee on Lobbying Activities failed in 1950.[77]

An injunction was issued in 1936 against the Western Union Telegraph Company and others on the complaint of Silas H. Strawn and others by the Supreme Court of the District of Columbia.[78] The importance of this decision is somewhat lessened by the fact that it was by a federal court of initial jurisdiction only, and the defendant was neither a committee of Congress nor its members. This decision has been described as moving "against the current of court approval of investigations,"[79] and doubt has been expressed

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[76] *Fischler and Saltzman v. McCarthy*, U. S. District Court, S.D. N.Y., Civ. 90-20. The opinion of I. R. Kaufman, D.J. noted that proper venue was in the District of Columbia, no jurisdictional amount was established as required by 28 U.S.C. §1331, and that the type of question presented and the nature of the relief sought was beyond the purview of the Judicial Branch of the Government.

[77] Committee for Constitutional Government and Edward A. Rumely v. Louis Little et. al., D.C., D.C., No. 2300-50.

[78] Strawn et. al. v. Western Union Telegraph Co. et. al., unreported (D.C. Sup. Ct., 1936) Eq. 60814-36. See 3 U. S. LAW WEEK 646, New York Times, March 12, 1936, p. 1. Plaintiffs were members of a Chicago law firm. Defendants had in their possession copies of telegrams which they had transmitted for plaintiffs. A Senate lobby investigating committee subpoenaed the copies of all telegrams, sent paid and/or received collect between the dates of February 1 and December 1, 1934, and charged to Winston Strawn and Shaw, First National Bank Building, Chicago, Illinois, and all of its associates and subsidiaries, and all of their known officers, employees, and agents. It is worthy of note that the subpoena did not restrict itself to copies of telegrams sent to or received from specific persons, or to telegrams relating to legislation in some way. Plaintiffs alleged in the complaint that many of the wires were privileged communications between attorney and client, and husband and wife. Plaintiffs alleged a contractual agreement with defendants providing for non-disclosure and set out Section 605 of the Communications Act of 1934 (47 U.S.C. §605) and Sections 7 and 7a of Chgs. 134, Illinois Revised Statutes, both of which relate to the secrecy of telegraph messages. Plaintiffs further alleged that the resolutions creating the Senate Committee violated the Fourth, Fifth, and Tenth Amendments, and that the subpoena issued by the Committee went beyond the scope authorized by the resolutions, were insufficient and improper in form and substance, and violated the Fourth, Fifth, and Tenth Amendments. A temporary restraining order was issued March 2, 1936, the day that the complaint was filed. A preliminary injunction was issued by Chief Justice Wheat on March 11, 1936. The court stated that the subpoena was so broad that obedience to it would result in "unreasonable and unlawful disclosure of telegrams which are privileged and confidential communications between . . . attorneys . . . and . . . clients . . . as to which the privilege has not been waived . . . (and other private communications between friends, members of families, etc.) including privileged and confidential communications between husband and wife . . ." The court also stated that the subpoena "is too broad and inclusive, is improper in form and substance, and . . . enforcement . . . would be contrary to and in violation of prohibitions against unreasonable searches and seizures contained in the 4th Amendment." After hearing on June 25, 1936, a permanent injunction was granted by Chief Justice Wheat. The reasons set out by the court were the same as those set out in the preliminary injunction. The above details have been set forth because the decision, though frequently cited by persons seeking to block Congressional investigations, has never been reported.

[79] McGeary, *op. cit.* supra note 46 at 522.

that the United States Supreme Court would uphold such a decision.[80] One of the present Justices of the Supreme Court was chairman of the Congressional committee involved in the Strawn case, and his views have been stated thus:

> Mr. McAdoo. "I think the dignity, as well as the power, of this body are such that when the Senate undertakes an investigation no court has the power to interfere with the processes of the Senate."
>
> Mr. Black. "I agree with the Senator fully.[81]"

Contempt

The most frequent challenge to the investigative power is by contemptuous conduct. The right of Congress to provide punishment for contempt was upheld by the judiciary early in our history.[82] Contempt power as to members is given to the House and Senate by the U. S. Constitution.[83] Contempt power as to nonmembers was discussed at the Constitutional Convention, but no action was taken.[84] Specific grant of such power was unnecessary in view of the general recognition of the power in the British Parliament and in colonial legislatures.[85]

The contempt may be of a house of Congress itself, or of one of its committees. Either type is punishable. The contempt may be tried by the house of Congress itself, or it may be referred to the United States Attorney for prosecution under 2 U.S.C. §192.[86] The referral to the appropriate United States Attorney is specifically provided for by statute.[87] Prosecution and conviction under one procedure does not preclude subsequent conviction under the other.[88]

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[80] Ehrmann, *op. cit.* supra note 18 at 134.

[81] 80 Cong. Rec. 3329 (1936). See also *Hearst V. Black*, 87 F2d 68 (C.A.D.C. 1936), where the judicial branch of government held that it was without power to restrain a Senate committee from use of documents obtained illegally.

[82] Anderson v. Dunn, 19 U. S. 204, (1821).

[83] U. S. CONST., Art. I, §5.

[84] For a review of colonial and early state precedents, see Potts, *op. cit.* supra note 3.

[85] See 2 Farrand, Records of the Federal Convention 341.

[86] The text of §192 is set forth in footnote 10 above.

[87] 52 Stat. 942, 2 U.S.C. §194. *Witnesses failing to testify or produce records.* "Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

[88] In re Chapman, 166 U. S. 661 (1897).

Adjudications of contempt by one of the houses of Congress itself occur much less frequently than referral to federal attorneys for prosecution under the U. S. Code.[89] Upon direct adjudication by the branch of Congress itself, the person held in contempt may be imprisoned for the remainder of the legislative session during which he was convicted.[90]

The amount of judicial review which is possible varies considerably in the two methods dealing with contempts. Where the trial and adjudication are by the house of Congress itself, the court is dealing with a legislative determination. On the other hand, when a case comes before the judiciary after prosecution under 2 U.S.C. §192, the court's function is much more extensive. In such cases it may consider whether the inquiry was authorized by and pertinent to the committee's grant of existence.[91] The courts may thus free persons voted in contempt by a committee and referred by the Congress to the federal prosecutor without passing directly on the power of Congress to investigate.

Contempt of Congress may consist of any one of a variety of actions: failure to appear, refusal to be sworn, refusal to testify, refusal to produce papers subpoenaed, or bribery of members. A refusal to appear or to give information may be based on the ground that the committee lacks jurisdiction to conduct the entire investigation, or merely that it has not the authority to ask a specific question.

A refusal to be sworn as a witness is a refusal to testify.[92] This is so even if the witness expresses willingness to testify but insists first on the right to make objection to Committee procedure.[93] A person who voluntarily appears before a committee is guilty of contempt if he thereafter refuses to testify.[94] Even a person brought before a committee involuntarily by force must testify.[95]

Failure to answer questions before Congressional committees is a violation of U. S. Code, §192, but only if the questions are pertinent.[96] The pertinency of questions is a matter of law which the court decides,[97] but under certain circumstances it may be nec-

[89] Instances of direct adjudication by Congress of contempt include: Anderson v. Dunn, 19 U. S. 204 (1821); Kilbourn v. Thompson, 103 U. S. 168 (1881); Marshall v. Gordon, 243 U. S. 521 (1917); McGrain v. Daugherty, 273 U. S. 135, 169 (1927); Barry v. U. S. *ex. rel.* Cunningham, 279 U. S. 597 (1929); Jurney v. MacCracken, 294 U. S. 125 (1935).

[90] Anderson v. Dunn, 19 U. S. 204 (1821).

[91] U. S. v. Rumely, 345 U. S. 41 (1953).

[92] U. S. v. Josephson, 165 F2d 82 (C.A.2d, 1947), cert. den. 333 U. S. 838 (1948).

[93] Eisler v. U. S., 170 F2d 273 (C.A., D.C. 1948), cert. granted 335 U. S. 857 (1948), dismissed, 338 U. S. 883 (1949).

[94] Sinclair v. U. S., 279 U. S. 263 (1929).

[95] Eisler v. U. S., 170 F2d 273, 279 (C.A.D.C. 1948); cert. granted, 335 U. S. 857 (1948); dismissed, 338 U. S. 883 (1949).

[96] Sinclair v. U. S., 279 U. S. 263 (1929).

[97] Sinclair v. U. S., 279 U. S. 263 (1929).

essary to plead and show pertinency.[98] It has been asserted that the limitation of pertinence "has been reduced to almost complete insignificance."[99] The witness who doubts that the question is pertinent acts at his peril if he refuses to answer. Vindication may come, if at all, only after citation by the Congressional committee, citation by the house of Congress, indictment, trial, appeal to an intermediate appellate court, and finally determination by the U. S. Supreme Court. This can be an expensive proposition, and it presents practical objections to refusing to answer on the grounds that the question is not pertinent.

The questions which an investigating committee of Congress poses may cause an individual inconvenience, embarrassment, or even substantial financial loss. Ridicule, social ostracism, economic boycott—all may face the witness, and yet he must answer. The public good and the general public interest has been weighed against the cost to the individual, and, at the moment, the decision is that the public interest is paramount, and will be served by disclosure.

A witness's good faith and honest belief that he is not legally required to answer is no defense to a prosecution under §192.[100] The elements of bad faith or evil purpose need not be present to constitute "willful default."[101] Evidence that the witness refused to answer because of advice of counsel is properly excluded.[102] The lawyer-client privilege against disclosure is inapplicable to Congressional investigations[103] and is therefore no grounds for refusal by a lawyer to testify.

A witness may not refuse to testify on ground that his "right of privacy" is invaded.[104] However, where the presence of television and newsreel cameras disturbs a witness, refusal to testify may not be contempt.[105] Also, where a Congressional committee holds open hearings, the attendant publicity may be such that criminal prosecutions of persons mentioned in the hearings will have to be postponed in order to assure a trial free of hostile atmosphere and public preconception of defendant's guilt.[106]

Witnesses have from time to time refused to answer on the ground that the replies will render them infamous, degrade them, disgrace, or humiliate them. There is no legal basis for refusal on

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[98] Bowers v. U. S., 202 F2d 447 (C.A.D.C. 1953).

[99] Driver, *Constitutional Limitations on the Power of Congress to Punish Contempts of Its Investigating Committees*, 38 VA. L. REV. 887 and 1011, at 1019 (1952).

[100] Sinclair v. U. S., 279 U. S. 263 (1929).

[101] Fields v. U. S., 164 F2d 97 (C.A.D.C. 1947), cert. den. 332 U. S. 851 (1948).

[102] Dennis v. U. S., 171 F2d 986 (C.A.D.C. 1948), aff'd, 339 U. S. 162 (1950).

[103] Jurney v. MacCracken, 294 U. S. 125 (1935).

[104] See note, *"Rights of Witnesses before Congressional Investigating Committees*, 35 MARQ. L. REV. 282 (1952).

[105] U. S. v. Kleinman, 107 F Supp. 407 (D.C., D.C. 1952). For arguments in favor of televising committee hearings, see *"Rights of Witnesses before Congressional Investigating Committees,"* 35 MARQ. L. REV. 282 (1952), which cites, *inter alia*, Senator Kefauver's arguments at 97 Cong. Rec. 9995 et seq.

[106] See Delaney v. U. S., 199 F2d 107, (C.A., 1st, 1952).

these grounds.[107] On the contrary, the statutes expressly provide otherwise.[108]

A witness may attack the vagueness of the resolution creating the committee before which he appears. Resolutions creating select committees, and statutes creating standing committees, however, provide no criminal sanctions in themselves and should not, therefore, be construed as criminal statutes. Attacks on authorizing resolutions are almost uniformly unsuccessful.[109] No witness has successfully attacked a contempt citation on the ground that the investigating committee was illegally constituted.[110] Nor is the fact that a judicial proceeding is pending, based on the same facts, valid grounds for refusal to testify.[111]

It has been shown above that once a person has been brought before a Congressional Committee, the manner of his coming is immaterial. However, a witness who refuses to appear may contest the validity of the subpoena which compelled his attendance.[112] A Congressional subpoena binds all persons served within the borders of the United States, citizens or not,[113] and inadequacy of service of the subpoena is not sufficient grounds for a court to upset a contempt adjudication.[114] A witness must produce subpoenaed documents if physically possible.[115] If a witness appears and refuses to be sworn or to testify at all, he may not thereafter attack the validity of the subpoena which brought him before the committee.[116] A witness who refuses to produce subpoenaed records may not at a later date contest a finding to that effect by alleging the absence of a quorum of the committee on the return date.[117]

A special situation exists where a Congressional committee

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[107] Brown v. Walker, 161 U. S. 591 (1896); U. S. v. Thomas, 49 F. Supp. 547 (D.C., W.D. Ky., 1943).

[108] §193. *Privilege of witnesses.* "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." 52 Stat. 942, 2 U.S.C. §193.

[109] But see *U. S. v. Rumely*, 345 U. S. 41 (1953) where the court adopted a narrow and unrealistic definition of the term "lobbying," possibly because of an inability to find general agreement among its members as to the substantive questions involved.

[110] Such attacks have been made. See Dennis v. U. S., 171 F2d 986 (C.A.D.C. 1948), aff'd 339 U. S. 162 (1950), re-hearing denied, 339 U. S. 950 (1950).

[111] Sinclair v. U. S., 279 U. S. 263, 295 (1929).

[112] McGrain v. Daugherty, 273 U. S. 135 (1927).

[113] Eisler v. U. S., 170 F2d 273 (C.A.D.C. 1948); cert. granted, 335 U. S. 857 (1948); dismissed, 338 U. S. 883 (1949).

[114] McGrain v. Daugherty, 273 U. S. 135, 155 (1927).

[115] Wilson v. U. S., 221 U. S. 361, 374-76 (1911); Barsky v. U. S., 167 F2d 241, 251 (C.A.D.C. 1947), cert. den. 334 U. S. 843 (1948).

[116] U. S. v. Josephson, 165 F2d 82 (C.A., 2d, 1947), cert. den., 333 U. S. 838 (1948); rehearing den. 333 U. S. 858 (1948); rehearing den. 335 U. S. 899 (1948).

[117] U. S. v. Bryan, 339 U. S. 323 (1950); rehearing den., 339 U. S. 991 (1950).

attempts to subpoena papers from the Executive branch. One of the principal obstacles in the path of Congressional investigations of the Executive branch of the government has always been the position of the latter that Congress cannot compel it to produce executive documents if the President deems their production incompatible with the public interest.[118] The Legislative branch has never succeeded in any pitched battle on this subject. At times the Executive acquiesces in the request, with or without the pressure of the Legislature's "power of the purse." At other times he stands fast and accumulates new precedents for succeeding administrations.

The publication of a defamatory letter reflecting on the conduct of an investigation has been held not to constitute contempt.[119] Any open interference with the orderly procedure of a committee hearing can be held to be contempt.[120]

The Congressional investigating power may be challenged inferentially by civil suit for false imprisonment by a person held in contempt,[121] or by a writ of *habeas corpus* brought to discharge a person held in confinement for contempt.[122]

PROCEDURAL CHANGES

Much has been written on possible changes in the procedure of Congressional investigating committees.[123] Changes have been proposed by members of Congress themselves[124] as well as by law review writers[125] and others.[126] One individual went so far as to in-

[118] For the position of the executive branch see Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B. J. 103 (1949). Compare the attitude of the legislative branch set forth in *Memorandum on Proceedings Involving Contempt of Congress and Its Committees*, U. S. Senate Judiciary Committee, Committee print, 80th Congress, 2d Session, January 6, 1947.

[119] Marshall v. Gordon, 243 U. S. 521 (1917).

[120] Landis, *op. cit.* supra note 3.

[121] Kilbourn v. Thompson, 103 U. S. 168 (1880).

[122] Marshall v. Gordon, 243 U. S. 521 (1917); Jurney v. MacCracken, 294 U. S. 125 (1935).

[123] See Garrison, *Congressional Investigations: Are They a Threat to Civil Liberties?* 40 A.B.A.J. 125 (February, 1954). The same article appears at 100 Congressional Record A1097 (Daily Edition).

[124] See Senator Lucas' S. Con. Res. 2, 95 Cong. Rec. 60 (1949); Representative Buchanan's H. Res. 824, and Representative Holifield's H. Con. Res. 4, all made in the 81st Congress, 1st Session; Representative Heller's H. Con. Res. 186, 83d Congress, discussed at 100 Cong. Rec. A29 (Daily Edition); and Senators Morse and Lehman's S. Con. Res. 64, 83d Congress. See also U. S. District Judge Charles E. Wyzanski's proposals at 3 RECORD OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK 93, reprinted at 94 Cong. Rec. A1547.

[125] See *Congressional Investigations—Salvation in Self Regulation*, 38 GEORG. L. J. 343, at 363, which sets forth a proposed "Tentative Draft of Suggested Committee Rules."

[126] See the 7 proposals of Dean Erwin N. Griswold of the Harvard Law School, New York Times, March 25, 1954, p. 20, c. 4, and discussion thereof by Arthur Krock at p. 28, c. 5. See also statement in behalf of the Bar Association of the District of Columbia before a special subcommittee of the Rules Committee of the House of Representatives, set forth at 100 Cong. Record A5306 (Daily Edition), August 3, 1953.

sert an advertisement in a newspaper noting that a petition was being circulated urging the President to "use his influence to the ends that Congressional investigations shall be governed by recognized legal principles and procedures."[127] It has even been suggested that a committee be established to review witnesses' claims of exemption from giving testimony.[128]

For an excellent analysis of proposed procedural rules for committees pending in 1949, see Meader, *Limitations on Congressional Investigations.*[129] The author, former counsel of the Senate War Investigating Committee and presently a member of the House, contends that no general procedural rules should be enacted.

The hue and cry for procedural changes are caused by the unrestrained conduct of a few legislators who, interested solely in increasing their personal power and notoriety, engage in reckless and irresponsible headline hunting with wild charges, unfounded accusations, etc. Such persons would probably ignore new procedural rules even as they now ignore laws of committee jurisdiction and the standards of fair play and good taste already established by tradition. The rules would, however, be obeyed by the bulk of the legislators, and would constitute a serious handicap to the accomplishment of the tasks of Congress.

The legislative process is bigger than any one legislator, and extreme care should be taken lest changes designed to confine one demagogue wreak havoc on the entire process.

CONCLUSION

The Congressional investigating power is an essential part of the legislative process and plays an important role in our tripartite system of government. The power is broad, and necessarily so. The limitations are few, and necessarily so. Our entire system of government should not be changed because the actions of a few outrage the public sense of decency. The public's desires should be directed toward its own selected representatives who have it within their power to restore the legislative investigation to a position of respect in the community.

We must not lose sight of the importance of the doctrine of separation of powers in our government. The investigating power of Congress is, at present, functioning almost exclusively through committees which are delegated authority by the two houses of Congress. These committees stand in the place of the Senate and the House. If the Senate or House itself chose to investigate a particular subject, went into plenary session, and began subpoenaing witnesses without any public statement as to its objectives, the inappropriateness of interference by the Executive or Judicial branch

[127] New York Times, February 21, 1954, Sec. 4, p. 6.

[128] *Congressional Investigations: A Plan for Legislative Review,* 40 A.B.A.J. 191 (March, 1954).

[129] 47 Mich. L. Rev. 775 (1949).

at this incubation stage in the legislative process would be apparent.

Later, the Executive might veto the bill which resulted from the investigation, or the Judiciary might hold the law unconstitutional. It is submitted that neither branch has any legitimate role to fulfill at the formative stage described above.

Much of the confusion on the subject of the Congressional investigation stems from the fact that many Americans have, erroneously, become convinced that witnesses before hostile committees are "on trial." Therefore, their sense of fair play demands: let the witness be faced by his accuser, let him have the opportunity to cross-examine other witnesses, etc. This is no less a perversion of the function of the legislative investigation than that of the headline hunting chairman who arouses the justifiable ire of the public. The investigating power is a part of the fact-finding process which is essential to intelligent law-making. Stripped of its broad investigating power, Congress would be unaware of the nation's needs, and the dangers to its existence. In such event, the America we know would not long endure.

"It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a a degree as the courts."[130]

No one is useless in the world who lightens the burden of it for anyone else.—Charles Dickens.

[130] Holmes, J., in M.K. and T. Railway v. May, 194 U. S. 267, 270 (1904).